89-1848

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CLAUDE LEWIS THOMAN,
Petitioner,

v.

CONCEPT, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARVIN J. ROSENBERG
Counsel of Record
10 Cuttermill Road
Great Neck, New York 11021
(516) 487-3900

QUESTIONS PRESENTED

1. What standard should be applied by the trier of fact in determining whether a release under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et. seq.* (ADEA), has been entered into knowingly and voluntarily?

2. How should a jury be instructed as to the appropriate standard to apply?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption of the case.

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REFERENCE TO OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals in *Claude Lewis Thoman, Plaintiff-Appellant v. Concept, Inc., Defendant-Appellee*, No. 88-6210, ("Thoman II"), is unpublished and is reproduced in Appendix A of this Petition.

A prior opinion of the court of appeals ("Thoman I") and memoranda and orders of the district court are reproduced in Appendices C, D and E.

GROUNDS FOR JURISDICTION

1. The judgment appealed from was rendered by the Fifth Circuit Court of Appeals on January 23, 1990. A suggestion for rehearing en banc was denied by Order dated Feb. 20, 1990. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves The Age Discrimination in Employment Act, 29 U.S.C. 621, *et. seq.*, which provides in relevant part:

§623. Prohibition of Age Discrimination

(a) Employer Practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to

> deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

Petitioner, Claude Lewis Thoman, brought this action complaining that he was discharged from his position as regional sales representative by Respondent, Concept, Inc., on account of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et. seq.* (the basis of federal jurisdiction), and in breach of his contract of employment. At the time he was terminated Thoman, whose gross income was upwards of $100,000.00 per year, was called to an airport meeting with Concept's national sales manager and given the choice of (1) signing a resignation/release and receiving $9,000.00, the equivalent of approximately one month's commission, or (2) being terminated on the spot. The language of the release was as follows:

> I, the undersigned, hereby accept the above as complete termination pay and forever release and discharge Concept, its subsidiaries and its directors, officers and employees from any and all present and future claims, demands, damages, actions and causes of action including but not limited to, claims arising out of worker's compensation laws and other employee and employee related law and regulations.

Despite asking if he could see an attorney before he signed the document, Thoman was denied the opportunity to consult with counsel and was required to make an immediate decision. Thoman signed the release and accepted the money.

At an early stage of the litigation the trial court entered summary judgment against Thoman, *sua sponte*, essentially reasoning that a common law accord and satisfaction standard applied to the release of an ADEA claim. (See Appendix C) The Fifth Circuit reversed, and in a per curiam opinion (See Appendix B, "Thoman I") articulated the factors to be considered in determining whether the release was knowingly and voluntarily executed, with particular emphasis on the following:

> Our review of the facts reveals that Thoman, in his letter to the judge, disputed several facts material to a finding that the release was knowingly and voluntarily executed. Thoman asserted that he did not understand that the release waived discrimination claims, that he was not advised that he could consult counsel and had no opportunity to do so, and that Jackson induced him to immediately sign the release. The broad language of the release does not refute Thoman's allegation that he did not know he was waiving his discrimination claim. The only evidence concerning Thoman's education or legal experience was Concept's bare statement that Thoman's sales position provided him with contract experience. In short, the district judge entered a summary judgment despite disputed and unsubstantiated facts concerning the effectiveness of the waiver.

(Appendix B, p. 21-A)

Following such reversal the case proceeded to trial and at the close of the case the trial court refused to instruct the jury on the knowing and voluntary issue by advising it of the factors identified in Thoman I. Rather, over Plaintiff's objection, the court instructed the jury on the question "Did Thoman knowingly and voluntarily release his age discrimination claim

against Concept when he signed the document dated February 21, 1985 and accepted the $9,000 from Concept as follows:

> Thoman acted knowingly if he had the ability to understand the release even if he was mistaken about the effect of the release or failed to read the release.
>
> Voluntarily means that Thoman signed the release and accepted the check intentionally. Voluntarily also means that Thoman made a free choice even though the pressures of personal and financial circumstances may limit an individual's range of alternatives. You may consider the education, background, experience, and position of the employee together with all of the circumstances of the signing of the waiver. Although Concept is not required to leave an offer open for any length of time, it may not force an employee to sign the waiver. You may also consider the value of Concept's performance under the waiver. For the release to have been involuntary, something substantial is required; a change of mind or second thought is not enough.

The jury answered the question "yes," judgment was entered against Thoman (See Appendix D), and the case was appealed to the Fifth Circuit again. (See Appendix A, "Thoman II"). Although the court in Thoman II found that the first sentence of the instruction regarding "knowing" was in error, it considered the error harmless in light of the evidence that Thoman had read the release, thought it waived a worker's compensation claim, and also harbored some concerns regarding previous statements made to him about his age. (Appendix A, p.7-A) Similarly, although the court agreed that the factors listed in Thoman I were all relevant, it reasoned that the trial court's reference to "all of the circumstances of the

signing of the waiver" along with the companion argument of Thoman's counsel precluded any necessity to articulate the two factors which Thoman deemed most important to the jury's determination: 1) the denial of an opportunity to consult with counsel prior to signing the release, and 2) the clarity (or lack of it) of the language of the release. (Appendix A, p. 9-A)

REASONS FOR GRANTING THE WRIT

For years now, Congress, the courts and the EEOC have grappled with the problem of unsupervised releases under the Age Discrimination in Employment Act, 29 U.S.C., § 621, *et. seq.* (ADEA). Although releases are obviously entered into under other civil rights statutes as well, releases under the ADEA are particularly problematic because they are generally executed before any charge has been brought or claim articulated, and thus, are not likely to be supervised by any agency or court. Despite all of the debate, however, there is still no clear standard for the trier of fact to apply in determining the validity of an ADEA release.

While all are in agreement that a release must be entered into knowingly and voluntarily in order to be valid, that is where the agreement ends. The circuit courts are split, with the Sixth and Eighth Circuits applying the standard of "ordinary contract principles," *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986) and *Lancaster v. Buerkle Buick Honda*, 809 F.2d 539 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); the Second and Third Circuits applying a "totality of the circumstances" standard, *Bormann v. A.T. & T. Communications, Inc.*, 875 F.2d 399 (2d Cir.) *cert. denied*, __ U.S. __, 110 S. Ct. 292 (1989) and *Coventry v. U.S. Steel Corp.*, 856 F.2d 514 (3d Cir. 1988); and the Fifth Circuit now, as a practical matter, falling somewhere in between. The EEOC has also advocated use of the "totality of the circumstances" standard, but Congress,

apparently in the belief that unsupervised releases should be curtailed, has suspended enforcement of the Commission's final rules. See 29 C.F.R. § 1627.16(c); Departments of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act, 1989, P.L. 100-459, 102 Stat. 2186, 2216 (1988).

In an area of such critical public concern, trial courts must have a consistent standard to follow, both for consideration by the judge alone in the event of summary disposition, and for instructing the jury that is found in virtually every age discrimination case that goes to trial. As this case so vividly demonstrates, no standard can have meaning if it is not properly communicated to the ultimate trier of fact.

I. THERE IS A CONFLICT AMONGST THE CIRCUITS REGARDING THE STANDARD TO BE APPLIED IN DETERMINING WHAT CONSTITUTES A KNOWING AND VOLUNTARY RELEASE UNDER THE ADEA.

The holding in Thoman II plainly suggests that the Fifth Circuit has now positioned itself somewhere between the "totality of the circumstances" standard followed by the Second and Third Circuits and the "ordinary contract principles" standard followed by the Sixth and Eighth Circuits. Although in Thoman II the Fifth Circuit acknowledged that the totality of circumstances surrounding a release needed to be explored, it effectively retreated from that test and validated a jury instruction which was rooted in the application of strict contract principles. The disputed jury instruction is a perfect example of why the two standards cannot be so intertwined.

In the context of waivers under the ADEA, the Second and Third Circuits (and the EEOC) have explicitly endorsed the "totality of the circumstances" approach which requires

"careful evaluation of the release form itself, and of the complete circumstances in which it was executed ... to assure that the goals of the ADEA are preserved." *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 523 (3d Cir. 1988). As stated in *Bormann v. A.T. & T. Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, __ U.S. _ , 110 S. Ct. 292 (1989), those circumstances would include: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement before signing it; (3) the role of the plaintiff in deciding the terms of the agreement; (4) clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law; (7) whether the employer encouraged or discouraged the plaintiff to consult an attorney; and (8) whether the plaintiff had a fair opportunity to consult an attorney. These latter two factors, both of which were added by *Bormann* to the *Coventry* list, have particular importance in the context of the instant case, where Thoman specifically requested and was denied the opportunity to consult with an attorney, and the trial court refused to instruct the jury in any way regarding the availability of counsel.

In contrast to the broad approach of the Second and Third Circuits, the Sixth and the Eighth Circuits follow a much narrower, harsher standard based on "ordinary contract principles." *See Lancaster v. Buerkle Buick Honda*, 809 F.2d 539, 541 (8th Cir.) *cert. denied*, 482 U.S. 928 (1987); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 n. 10 (6th

Cir.) *cert. denied*, 479 U.S. 850 (1986). Under that standard, only the plaintiff's capacity and the presence of "fraud, deceit, or unconscionable overreaching" are really at issue.[1] *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033 (8th Cir. 1986).

The Fifth Circuit's willingness to forgive the first sentence of the disputed instruction in Thoman II and its corresponding unwillingness to require enunciation of particular factors it previously recognized in Thoman I, *Rogers v. General Electric Co.*, 781 F.2d 452, 456 (5th Cir. 1986) and *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 947 (5th Cir.) *cert. denied*, 452 U.S. 906 (1981), underscores both a retreat from the "totality of the circumstances" approach and the articulation of a contradictory standard. In reversing the trial court's grant of summary judgment the court in Thoman I specifically noted that there were material fact issues that bore upon whether Thoman knowingly executed the release, including the lack of opportunity to consult with counsel and the language of the release itself. Indeed, Thoman I implicitly recognized the lack of clarity in the release language by noting that "[t]he broad language of the release does not refute Thoman's allegation that he did not know he was waiving his discrimination claim." (Appendix B, p. 21-A) Nevertheless, the court in Thoman II found that the error in the first sentence of the instruction, which made "knowing" simply a measure of mental capacity ("Thoman acted knowingly if he had the *ability* to understand the release..."), was harmless in light of the evidence, counsel's argument, and the later reference in the instructions to considering "all of the circumstances" surrounding the release. The court in Thoman II gave the jury greater credit than it would give a trial court.

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[1] Although it stated that ordinary contract principles should apply, the Court in *Runyan* also looked to other factors, thus perhaps placing itself more in line with the Fifth Circuit.

Plaintiff is mindful of the broad latitude that trial courts must be given in shaping jury instructions and the language of *Mayo v. Borden, Inc.*, 784 F.2d 671, 677 (5th Cir. 1986) cited in Thoman II at page 6 regarding the need for "substantial and ineradicable doubt" before a case may be reversed on the basis of an erroneous instruction, but as the *Mayo* court cautioned, one must look to "the charge as a whole," not simply the disputed instruction. Even if the error in the first sentence of the instruction here can somehow be diminished by the argument of counsel as to "all of the circumstances" how can that be squared with the standard admonitions of the charge that:

> Statements, objections, or arguments made by the lawyers are not evidence. Although the lawyers may in their closing statements point out things that they think are significant, it is your recollection on interpretation of the evidence that controls in this case. What the lawyers say does not bind you.
>
> * * *
>
> In considering the evidence, you must follow the instructions in this Charge and all other instructions that you have been given.
>
> You are not to question the wisdom of the law; you must apply it as I give it to you.

Can there be any doubt that if a trial court made a knowing finding based on mental capacity, as required by the disputed instruction, that the error would be deemed harmful under the "totality of the circumstances" standard. By rationalizing away the first sentence of the instruction, as well as the exclusion of certain factors that the court previously noted would bear upon a "knowing" finding, with the argument

of counsel, the court in Thoman II adopted a different standard for determining what constitutes a knowing and voluntary release under the ADEA, thus adding further to the conflict amongst the circuits.

II. THE LOWER COURTS NEED GUIDANCE ON HOW JURIES ARE TO BE INSTRUCTED REGARDING THE APPROPRIATE STANDARD.

The difficulty that the trial court experienced here in fashioning a proper jury instruction on the knowing and voluntary standard cannot be ignored.

As noted, any number of appellate courts have addressed the specific factors that comprise the totality of circumstances that a trial court must analyze in relation to this issue. Yet, for the jurors who must decide whether an ADEA plaintiff has released a civil right knowingly and voluntarily, only the district judge's instructions serve as guidance. In fact, the judge, as he did in the present case, will instruct the jury that only his instructions should be used to guide them on the law, not the arguments of counsel. So while judges, lawyers, and legislators may know all the details of when and how older workers may release this civil right, the jury may be woefully ignorant of the appropriate standard to be applied, depending on the accuracy and completeness of the court's instructions.

Rights protected by the ADEA have been found to be too important for their release to be based on the common law

of contracts and yet, as is obvious here, the standard articulated by trial court was more akin to that than anything else.[2] Likewise, these rights are too important to be based on the guesswork of a jury as to what constitutes "all of the circumstances" it may consider in determining whether such rights have been knowingly and voluntarily waived. Is the opportunity to consult with counsel (particularly, as here, where it is asked for and denied), for example, as important as appellate decisions, EEOC guidelines and the proposed Age Discrimination in Employment Waiver Protection Act,[3] suggest? If it is, then it should be specifically communicated to the jury in the Court's charge, and not left to the argument of counsel. The same, of course, is true of the other factors as well. Both trial courts *and* juries need the guidance of this Court.

CONCLUSION

Adverse employment decisions that have particular effect on older workers are a fact of American economic life. Employers who seek to avoid ADEA litigation frequently require releases as a condition of remuneration to the discharged or laid off employee within the protected bracket of the Act. As Congress has obviously noted, some employers will abuse this option, and whether the releases they obtain are valid will remain a common question for the courts.

It is evident that the conflict amongst the circuits

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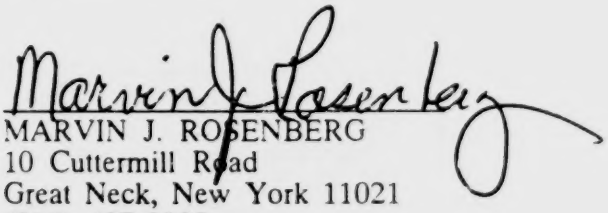
2 Indeed, even the court in Thoman II was under the mistaken belief that the disputed instruction addressed both Thoman's age claim and contract claim. In fact, it did not. (See language of Question No. 1, quoted at p. 5, and Appendix A, p. 7-A.)

3 See 101st Cong., 1st Sess. 135 Cong. Rec. S168 (January 25, 1989) and 100th Cong., 2d Sess. 134 Cong. Rec. S14509 (October 4, 1988).

regarding the proper way to instruct a jury on the waiver of ADEA rights must be resolved. The Sixth and Eighth Circuits have historically applied a rather harsh "ordinary contract principles" standard. Under this standard, a signature alone may serve to forever release the valuable civil right to be free from age discrimination in employment. The Second and Third Circuits, on the other hand, have looked more broadly to the "totality of the circumstances" in deciding whether or not to uphold the validity of such releases. Ironically, in Thoman I and Thoman II, the Fifth Circuit has employed both standards. If the state of the law is such that it confuses the same circuit in the same case, then it is time for the Supreme Court to favor the Bar with guidance.

Respectfully submitted,



MARVIN J. ROSENBERG
10 Cuttermill Road
Great Neck, New York 11021
(516) 487-3900

ATTORNEY OF RECORD
FOR PETITIONER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRTH CIRCUIT

88-6210

CLAUDE LEWIS THOMAN,
Plaintiff-Appellant,
VERSUS
CONCEPT, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(CA-H-86-1955)
(January 23, 1990)

Before GEE, JONES, and SMITH, Circuit Judges :

JERRY E. SMITH, Circuit Judge : [1]

Plaintiff Claude Lewis Thoman filed suit against his former employer, Concept, Inc. ("Concept"), alleging breach of his employment contract and violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 55 621-634. The jury returned a verdict in favor of Concept,

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1 Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

finding that a release signed by Thoman at the time of his resignation operated as a waiver of any contractual or statutory claims. On appeal, Thoman contends that the district court erroneously instructed the jury on the elements of an effective waiver of discrimination claims and improperly excluded evidence of Concept's written personnel policies. Finding no reversible error, we affirm.

I. Background and Procedural History.

Thoman worked as a sales representative for Concept from September 1977 until February 21, 1985, when he resigned under threat of termination. For several months prior to his resignation, Thoman had been aware that his job with Concept was in jeopardy. Beginning in June 1984, he had received several letters from his supervisor, Robert Jackson, criticizing his job performance.

Thoman allegedly suspected, however, that Jackson's letters were merely a "paper trail" designed to conceal Concept's true reason for deciding to terminate him — his age.[2] At trial, Thoman testified that Jackson told him in January 1985 that he was "too old for the job" and that Concept wished to replace him with a younger employee. Concept's witnesses disputed these allegations and testified instead that Thoman was fired because of his failure to meet his sales quota.

In February 1985, Jackson met with Thoman at a hotel in Houston. Jackson began the meeting by telling Thoman, "Lew, I'm going to have to let you go," but he then offered

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2 Thoman was 42 years of age at the time of his resignation and was therefore protected by the ADEA, which prohibits discrimination against "individuals who are at least 40 years of age but less than 70 years of age." 29 U.S.C. § 631(a).

Thoman a choice: He could either accept Concept's decision to terminate him or resign his position and receive $9,000 in severance pay, an amount to which he would not otherwise have been entitled. If he chose to resign and to accept the $9,000, Thoman would be required to sign an agreement releasing Concept from "any and all present and future claims, demands, damages, actions and causes of action including but not limited to, claims arising out of workers' compensation laws and other employee and employee-related laws and regulations." Jackson refused Thoman's requests for more time and for the opportunity to consult an attorney before signing the release. Thoman then read the agreement, told Jackson that he had no objection to waiving workers' compensation claims because he did not have "a bad back, or bad feet, or anything," signed it, and walked away. The meeting between Jackson and Thoman lasted approximately five minutes, and Thoman had the release in his possession for "maybe a minute." Although Thoman was concerned about Jackson's remarks regarding his age and wondered whether Concept could legally "get rid of him" for that reason, he signed the release anyway in order to "get his $9,000." This case is before us for the second time. At an earlier stage of this litigation, the district court determined that the release operated as an "accord and satisfaction" of any contractual or statutory claims which Thoman might have had against Concept; therefore, the court entered a sua sponte summary judgment for Concept. In an unpublished opinion, Thoman v. Concept, Inc., No. 87-2377 (5th Cir. Sept. 25, 1987) ("Thoman I"), we reversed and remanded for further proceedings, concluding (i) that the district court had applied an incorrect legal standard in assuming that the release was effective as an accord and satisfaction even if it was not knowingly and voluntarily executed and (ii) that material factual disputes regarding the circumstances surrounding the release precluded entry of a summary judgment to the effect that the release had been knowingly and voluntarily executed.

Following remand, the case proceeded to trial. At the close of the evidence, the district judge directed the jury, inter alia, to find whether Thoman had "knowingly and voluntarily" waived his contractual and statutory claims and gave the following instruction on the meaning of that requirement:

> Thoman acted knowingly if he had the ability to understand the release even if he was mistaken about the effect of the release or failed to read the release. Voluntary means that Thoman signed the release and accepted the check intentionally. Voluntarily also means that Thoman made a free choice even though the pressures of personal and financial circumstances may limit an individual's range of alternatives. You may consider the education, background, experience and position of the employee together with all the circumstances of the signing of the waiver. Although Concept is not required to leave the offer open for any length of time, it may not force an employee to sign the waiver. You may also consider the value of Concept's performance under the waiver. For the release to have been involuntary, something substantial is required; a change of mind or second thought is not enough.

Informed by this instruction, the jury concluded that the release was a knowing and voluntary waiver of Thoman's statutory and contractual claims and returned a verdict in favor of Concept. Thoman now appeals only the adverse judgment on his statutory claims.

II. The Jury Instruction.

A.

We begin our review of the challenged jury instruction with a brief discussion of the law regarding waivers of civil rights claims. While such waivers do not ordinarily violate public policy, Rogers v. General Electric Co., 781 F.2d 452, 454 (5th Cir. 1986), they must be entered into knowingly and voluntarily. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52

n. 15 (1974); Mosley v. St. Louis Southwestern Ry., 634 F.2d 942, 946 n. 5 (5th Cir. Unit A Jan. 1981), cert. denied, 452 U.S. 906 (1981). Federal law requires that waiver not be "lightly inferred." Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir.), cert. denied, 429 U.S. 861 (1976). Thus, instead of presuming, as in an ordinary contract dispute, that a "signature implies understanding," id., the trier of fact must consider all of the circumstances surrounding the signing of the release.

In determining whether a release was knowingly and voluntarily executed, courts have looked to a number of factors, including (1) whether the document unambiguously released the employee's discrimination claims, Rogers, 781 F.2d at 456; (2) whether the employee was given the opportunity to consult an attorney before signing the release, id.; (3) whether the employee had education or legal experience that would enable him to understand the release, id.; (4) whether the evidence suggested overreaching or other improper conduct by the employer, Mosley, 634 F.2d at 947; and (5) whether the employer's return promise provided substantial relief. Id. at 946. No one factor, however, has been held dispositive of the inquiry.

B.

When reviewing the adequacy of a trial court's instructions to the jury, we must "consider the charge as a whole, in connection with the contentions made by the parties..., and from the standpoint of the jury. If the charge in general correctly instructs, then even though a portion is technically imperfect, no harmful error is committed." Troutman v. Southern Ry. Co., 441 F. 2d 586, 590 (5th Cir.), cert. denied, 404 U.S. 871 (1971). Trial courts are afforded wide discretion in shaping jury instructions, Corey v. Jones, 650 F.2d 803, 806 (5th Cir. Unit B July 1981), and we will reverse a verdict because of an erroneous instruction only when

we are left with "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Mayo v. Borden, Inc., 784 F.2d 671, 672 (5th Cir. 1986) (citations omitted). With these general principles in mind, we address each of Thoman's challenges to the jury charge.

Thoman first argues that the first sentence of the instruction ("Thoman acted knowingly... even if he was mistaken about the effect of the release or failed to read the release.") was misleading because it enabled the jury to conclude that a knowing and voluntary waiver could be presumed from Thoman's signature on the release form. While we agree that this statement was erroneous in light of Watkins's admonition that waiver not be lightly inferred, we conclude that the error was harmless. Thoman admitted at trial that he read the release, and his statements regarding workers' compensation indicate that he realized that the release waived at least one type of legal claim. He further testified that he signed the release despite his concerns about Jackson's remarks regarding his age. Thus, when viewed in connection with the evidence and arguments presented at trial, the first sentence of the charge could not have misled the jury or resulted in any prejudice to Thoman.

Thoman next contends that the last sentence of the instruction ("For the release to have been involuntary, something substantial is required; a change of mind or second thought is not enough.") improperly suggested that he bore the burden of proving that the waiver was not knowingly and voluntarily executed. However, a plain reading of the challenged sentence indicates that it does not speak to the issue of burden of proof. Instead, it suggests only that an initially valid waiver does not become invalid because the plaintiff later changes his mind or realizes that he might have obtained more money by taking the defendant to court.

This is a correct statement of the law. As we noted in Mosley, 634 F.2d at 946 n. 5, "[A] settlement agreement may [not] be avoided... [merely because] a claimant later demonstrates that he or she settled for less than might otherwise have been obtained through litigation." Thus, we conclude that Thoman was not prejudiced by the last sentence of the jury charge.

Finally, Thoman argues that the district court erred in failing to enumerate six factors[3] used in determining whether a release was knowingly and voluntarily executed. He claims to have been prejudiced primarily by the omission of two of those factors: the opportunity to consult counsel and the clarity of the language in the release. As we noted above, however, waivers are evaluated under a "totality of the circumstances" test, with no one factor being dispositive. See Rogers, 781 F.2d at 452; Mosley, 634 F.2d at 942; Watkins. Hence, Thoman was not entitled to any particular enumeration of factors, but only to an instruction that directed the jury, as this one did, to consider "all of the circumstances of the signing of the waiver."

Thoman was allowed to introduce evidence regarding the circumstances he believed to be important. Thoman testified that he was not given the opportunity to consult a lawyer before signing the release, and his counsel emphasized the importance of that fact in his closing argument. No Concept witness disputed Thoman's testimony on that point, and Concept's counsel did not attempt to exclude that evidence or

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3 Thoman's proposed jury instruction listed six factors. As Concept points out, however, the courts also have looked to numerous other factors in evaluating the validity of waivers of civil rights claims.

to argue that the opportunity to consult a lawyer was irrelevant in determining whether the release had been knowingly and voluntarily executed.

The jury thus was aware that Thoman had signed the release without the benefit of legal advice and could take that into account in reaching its verdict. The jury also was allowed to read the release form itself and to decide whether its language was clear and unambiguous and whether Thoman in fact understood that it released his ADEA claims. Apparently, the jury simply concluded that Thoman, who has a college education and experience with insurance and sales contracts, was able to understand the release without consulting an attorney.

Thus, each of Thoman's individual challenges to the instruction must fail, and a review of the charge as a whole satisfies us that it adequately stated the law regarding waivers of discrimination claims. The jury was properly directed to determine whether the release was knowingly and voluntarily executed and, in making that determination, to consider "all of the circumstances of the signing of the waiver," including the "education, background, experience and position of the employee" and "the value of Concept's performance under the waiver." The jury was further advised that the waiver had to be the product of a "free choice" and that Concept could not force Thoman to sign a release. Because the instruction does not leave us with "substantial and ineradicable doubt whether the jury was properly guided in its deliberations," Mayo, 784 F.2d at 672, we cannot reverse the judgment on that ground.

III. Personnel Policies.

Thoman also asks us to review one of the district court's evidentiary rulings. At trial, Thoman sought to introduce evidence of Concept's written personnel policies. He wished to demonstrate that Concept did not ordinarily terminate its salespeople for failing to meet quotas and that therefore its stated reason for terminating him was a mere pretext. While such a showing would have been relevant to his discrimination claim, we have already concluded that the jury was properly instructed on the issue of waiver and therefore was entitled to find that Thoman had released any discrimination claims he may have had. We therefore conclude that this evidentiary question is irrelevant to the outcome of Thoman's appeal, and hence we decline to review its merits.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-2377
Summary Calendar

CLAUDE LEWIS THOMAN,
Individually and on behalf
of others similarly situated,

Plaintiff-Appellant,

v.

CONCEPT, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-86-1955)

(September 25, 1987)

Before REAVLEY, RANDALL and JOLLY, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Lewis Thoman appeals from a summary judgment and denial of his motion for a new trial in a suit against his former employer for age discrimination and breach of his employment contract. Because there were genuine issues of material facts surrounding Thoman's execution of a waiver and release of his claims, we conclude that summary judgment was inappropriate, and we reverse.

I.

Claude Lewis Thoman ("Thoman") sued his former employer, Concept, Inc. ("Concept") for age discrimination under the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 621-34, and breach of his employment contract. During discovery, the district court entered summary judgment for Concept on its own motion because the court found that undisputed facts established that Thoman had validly waived his claims in a written agreement signed at the time he resigned from employment. Thoman filed a timely motion for a new trial, alleging errors of procedural and substantive law and presenting evidentiary material to create a factual dispute concerning the voluntariness of the written waiver. The district court denied the motion, and Thoman appealed from the final judgment.

Because the district court disposed of this case by summary judgment against Thoman, we present the facts in the light most favorable to him. Thoman worked for Concept as a sales representative from September, 1977, until February 21, 1985. On that date, Thoman (who was over forty years old) met with Robert Jackson ("Jackson"), Concept's National Sales Manager, who terminated his employment. In the brief meeting (lasting three or four minutes) held at a Houston airport, Thoman formally resigned to avoid being discharged and signed a previously prepared document purporting to release Concept from all claims "arising out of worker's compensation

laws and other employee related laws and regulations."[1] In return, Concept agreed to pay Thoman all earned comissions and $9,000 severance pay, which he later received. According to Thoman, he did not know before the meeting that its purpose was to discuss his termination; he signed the release because Jackson told him that if he did not, he would be discharged without severance pay; and he executed the agreement without understanding the potential consequences of signing the document and without the opportunity for meaningful deliberation or consultation with legal counsel.

In a scheduling conference on January 20, 1987, the parties discussed the issue of waiver, a defense asserted by Concept in its answer. At that time, the district court orally instructed the parties to submit statements of their positions in written memoranda by certain dates — Thoman, by January 28, and Concept, by February 9. Although the parties characterize the court's instructions differently, their responses suggest that

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1 The material portion of the release read:

> I, the undersigned, hereby accept the above as complete termination pay and forever release and discharge Concept, its subsidiaries and its directors, officers and employees from any and all present and future claims, demands, damages, actions and causes of action including but not limited to, claims arising out of worker's compensation laws and other employee and employee related laws and regulations.
>
> In subsequent portions of the document, Thoman agreed not to make disparaging remarks about Concept, not to disclose trade secrets or confidential information, and to return any samples, reports, or other confidential data in his possession.

the judge communicated his belief that waiver was a potentially dispositive issue and his desire that the parties provide factual information concerning the execution of the release and legal authority[2] The court apparently found that the parties' submissions provided a sufficient basis for summary judgment; the court, on its own motion, entered judgment against Thoman on February 24, accompanied by a "Memorandum on Summary Judgment."

The court's analysis of the waiver issue, as presented in its memorandum, is somewhat unclear. The court stated that summary judgment was proper because Thoman conceded "that there are no disputes over his acts which constitute a waiver." The court expressly assumed for its analysis that the release was not knowing or voluntary. However, the court also noted that the only "objective duress" asserted by Thoman was Jackson's statement that if Thoman was terminated, he would not receive severance pay. The court proceeded to distinguish discrimination cases holding that particular releases were non-binding. See, e.g., Mosley v. St. Louis Southwestern Ry., 634 F.2d 942 (5th Cir. Unit A Jan. 1981), cert. denied, 452 U.S. 906 (1981). Stating that public policy favors voluntary settlement of employment discrimination claims (citing Rogers v. General Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986)), the court concluded that the agreement signed by Thoman operated

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2 The record contains no transcript of the conference, and the conference memorandum merely lists pre-trial deadlines. Arguably, Thoman did not understand that the court might summarily dismiss the case because he merely submitted a letter addressed to the district judge. However, the letter stated "[t]he material facts surrounding the execution of this release" and argued legal authority concerning valid waivers of discrimination claims. Concept filed "Defendant's List of Authorities and Statement of Facts Regarding Plaintiff's Waiver of Claims" with a certificate of service upon Thoman's counsel. The court later stated that the parties had "briefed" the issue.

as an "accord and satisfaction" and precluded any further litigation of contractual or statutory claims."

On March 6, 1987, Thoman filed a motion for a new trial. In his motion, Thoman argued that (1) the entry of summary judgment was procedurally incorrect because he received insufficient notice of the court's pending action, (2) summary judgment was improper because the court relied on Concept's unsubstantiated statement of facts to establish waiver, a defense which Concept was required to prove, and (3) the court applied the wrong legal standard in finding that the release effectively waived Thoman's ADEA claim. In addition, Thoman submitted additional evidentiary materials to controvert facts stated in the court's memorandum and to establish that the waiver was not knowing and voluntary. On April 3, the court denied Thoman's motion without stating any reason for its decision.

Thoman appealed on April 13 and raised the following issues: (1) whether the district court erred in granting summary judgment on its own motion based on unsubstantiated statements of fact and in finding that the written release signed by Thoman constituted a valid waiver of his claims; and (2) whether the district court abused its discretion in denying Thoman's motion for a new trial after receiving additional evidence purporting to show that the waiver was not knowing or voluntary. In his appellate brief, Thoman presents arguments substantially similar to those he made before the district court in his new trial motion to support his position that summary judgment was improper.

In response, Concept argues that the entry of summary judgment was procedurally correct because Thoman received adequate notice of the court's pending action at the scheduling conference and, alternatively, that Thoman was not prejudiced by any error because he had an adequate opportunity to present

evidence. Concept also argues that summary judgment was proper because the statements of fact submitted by the parties were functionally equivalent to admissions and provided a sufficient basis for a determination that no factual issues existed. Finally, Concept contends that the district court's rulings were correct because undisputed facts established that Thoman effectively waived his claims.

II.

We review a summary judgment by the same standards that control the district court's determination. Russell v. Harrison, 736 F.2d 283, 287 (5th Cir. 1984). The court must draw all inferences in favor of the party opposing summary judgment and determine that there is no genuine issue as to any material fact. Id.; Fed. R. Civ. P. 56(c). In this case, the district court entered summary judgment against Thoman because it found no genuine issue on the facts necessary to establish a valid waiver and release, affirmative defenses to Thoman's statutory and contractual claims. Thus we will review the facts most favorably to Thoman and determine whether the district court's finding was correct.

Before reaching the merits of the judgment, we first address Thoman's assertions that the district court's action was procedurally improper. The district court entered summary judgment on its own initiative based solely on the pleadings, a copy of the written agreement executed by the parties when Thoman resigned, and the statements submitted by counsel for the parties following the scheduling conference. The Supreme Court has stated: "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." See Celotex Corp. v. Catrett, U.S., 106 S. Ct. 2548, 2554 (1986). One could reasonably conclude that Thoman did not receive that notice.

Concept now seeks to characterize the district judge's oral instructions at the scheduling conference as an invitation for cross-motions for summary judgment. Answer Brief of Defendant- Appellee Concept, Inc. at 4, 7. However, the parties' actual responses belie that characterization. Concept did not file a motion and did not present evidentiary materials to establish its defense as the summary judgment procedure normally requires. In fact, Thoman merely submitted a letter to the judge; he apparently did not view the judge's instructions as a request for a formal document nor a request for evidence.

Assuming, however, that the district judge's comments during the conference provided adequate notice that he was considering summary disposition of the case, we question whether Concept's filed statement of facts provided a sufficient basis for summary judgment. According to the Supreme Court, a court acting on a summary judgment motion should rule "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 106 S. Ct. at 2552-53. Although Celotex involved the sufficiency of a plaintiff's showing on the elements of his claim, the logical corollary of the Court's statement is that a defendant must make a sufficient showing to establish his affirmative defense (on which he bears the burden of proof at trial) in order to receive a summary judgment in his favor.

Accordingly, Concept bore the burden of producing evidence to establish the validity of the waiver and release. The only evidence presented to the district court, aside from the agreement itself, was the unsubstantiated assertions of counsel, who apparently had no personal knowledge of the circumstances surrounding the execution of the agreement. Consequently, Concept argues on appeal that Thoman's statement of facts in his letter to the judge should be treated as

an admission or stipulation that established a sufficient basis for summary judgment.[3] We view this posturing as unnecessary because we judgment conclude that the district court's substantive decision was erroneous.

A release of an employment discrimination claim ordinarily does not violate public policy, but a release waiving such statutory rights must be knowing and voluntary. Rogers v. General Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974)). Federal law determines whether a release of a federal statutory claim was properly obtained, and federal law requires that a valid waiver not be lightly inferred. Id. at 454-55 (citing Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir.), cert. denied, 429 U.S. 861 (1976)). These rules have been applied in ADEA cases. See, e.g. , E.E.O.C. v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987).

In Rogers, the court affirmed a summary judgment against an employee because the undisputed proof established that she knowingly and voluntarily executed a release. The

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[3] Concept cites United States v. One Heckler-Koch Rifle, 629 F.2d 1250, 1253 (7th Cir.1980), where the court assumed that a party's representation to the district court, which was neither in a pleading nor affidavit, could be treated as an admission and a basis for summary judgment. We also note that stipulations are a proper evidentiary basis for a summary judgment and that uncontested statements of fact may sometimes be treated as stipulations. Munoz v. International Alliance of Theatrical Stage Employees & Moving Picture Mach. Operators, 563 F.2d 205, 213-14 (5th Cir. 1977).

court relied on these facts: (1) the document clearly and unambiguously released the discrimination claims (under Title VII);[4](2) before signing the release, the employee was advised both orally and in writing that she could consult an attorney; (3) the employee's testimony indicated that at the time she executed the release, she believed she had a valid discrimination claim against her employer; and (4) rather than pursuing legal remedies, she accepted $800 in exchange for a release. Rogers, 781 F.2d at 456. The court also noted that a significant fact was that the employee, an educated person, had previously been employed to read and analyze complex Department of Defense contracts. Id. at 456 n.8.

Similarly, in Mosley v. St. Louis Southwestern Ry., 634 F.2d 942 (5th Cir. Unit A Jan. 1981), cert. denied, 452 U.S. 906 (1981), the court reversed the district court's finding that employees had voluntarily and knowingly waived their discrimination claims because they were denied access to counsel. The court also considered the employees' limited formal education, their lack of legal experience, the ambiguous circumstances surrounding the signing of the settlement agreements, and the fact that the employer's return promise provided insubstantial relief. Id. at 946.

From these cases, it is clear that the district court applied an improper legal standard in determining that Thoman validly waived his ADEA claim. The court assumed that the release was not knowing or voluntary and proceeded to find

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4 The document signed by the employee specifically released all claims resulting from violations of any equal employment opportunity laws, including Title VII. It also stated that the employee had a right to consult an attorney and acknowledged that she was voluntarily accepting the payment as a full settlement.

that the agreement operated as an "accord and satisfaction." Our review of the facts reveals that Thoman, in his letter to the judge, disputed several facts material to a finding that the release was knowingly and voluntarily executed. Thoman asserted that he did not understand that the release waived discrimination claims, that he was not advised that he could consult counsel and had no opportunity to do so, and that Jackson induced him to immediately sign the release. The broad language of the release does not refute Thoman's allegation that he did not know he was waiving his discrimination claim. The only evidence concerning Thoman's education or legal experience was Concept's bare statement that Thoman's sales position provided him with contract experience. In short, the district judge entered a summary judgment despite disputed and unsubstantiated facts concerning the effectiveness of the waiver.

Concerning Thoman's contractual claim, the district court concluded that the release operated as an "accord and satisfaction" and therefore precluded further litigation of Thoman's breach of contract claim. Thoman's challenge to this conclusion is that Concept did not make a sufficient showing to support it. In his letter to the district judge, Thoman stated that he signed the release not as a settlement of his breach of contract claim, but merely as a precondition to receiving severance pay. Thoman's employment contract was not presented to the district court, and the terms of the release agreement do not unambiguously express the parties' intent to settle a contractual dispute. Thus we conclude that summary judgment on the contractual claim was also premature.

Because we hold that summary judgment was inappropriate in this case, we need not consider the denial of Thoman's motion for a new trial.

III.

For the above reasons, the summary judgment is REVERSED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTORIA U.S.DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
FEB 24 1987
JESSE E. CLARK, CLERK
BY DEPUTY:
/s/ J. Richard

CLAUDE LEWIS THOMAN,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. H-86-1955
	§	
CONCEPT, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OF SUMMARY JUDGMENT

The issue of waiver was raised at a Rule 16 pre-trial conference and later briefed by both parties. Because the plaintiff concedes that there are no disputes over his acts which constitute a waiver, the court will grant summary judgment for the Concept on Claude Thoman's suit for age discrimination and for breach of an employment contract. The parties have furnished a copy of a settlement agreement, signed by Thoman at the time of his resignation in consideration for $9,000 and February commissions; it releases the employer from contractual and statutory claims. The employer had no obligation to pay Thoman $9,000.

Because of judicial reluctance to apply rules of contract law to the administration of remedial civil rights statutes, the court will for the purpose of this analysis indulge the plaintiff's assertion that his release was not knowing or voluntary.

Thoman worked for Concept, Inc., as a primary sales representative, earning in excess of $100,000 a year through the sales position, Thoman acquired experience making and interpreting contracts. The contract at issue here was executed " by Thoman and his supervisor at a hotel lounge during a brief meeting. Thoman's resignation letter, which he read before signing, is short and simple. It discharges Concept "from any and all present and future claims... including but not limited to claims arising out of worker's compensation laws and other employee and employee related laws and regulations." The only objective duress which Thoman points to is a reminder by his supervisor that, were he to be terminated, it would be without severance pay. That the meeting was brief and the release prepared in advance does not amount to duress or trickery.

This controversy is not analagous to cases in which releases of discrimination claims have been held not to be binding because the employee at the time of execution was ignorant about the consequences of his release. The Supreme Court held that a maintenance worker's submission to arbitration of a claim under the nondiscrimination clause of a collective bargaining agreement was not a binding waiver of his Title VII claims. Alexander v. Gardner-Denver Company, 94 S. Ct. 1011, 1021 (1974). Unlike the maintenance worker in Alexander, who signed a collective bargaining agreement which his employer claimed was a waiver, Thoman was given a personal resignation letter, advised by his supervisor of what his alternative was, accepted $9,000, and has not offered to return the settlement. In Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976), black litigants with limited formal edcation sued their employer, a company with a history of racial discrimination. The court held a waiver signed by the employees as applicants non-binding. Thoman not only held a management position but his sales responsibilities required a

familiarity with contracts. The resignation letter here is not an unknowing blanket waiver for acts in the future.

Thoman, unlike the plaintiffs in Mosley who asked to see an attorney before signing a release but were not given the chance to consult one, never hesitated to accept the $9,000 settlement. Mosley v. St. Louis Southwestern Railway, 634 F.2d 942 (5th Cir. 1981). According to the defendant, Thoman commented when signing the agreement that it was a relief since he knew his termination was imminent. It is inconceivable that Thomas would have refused to sign the agreement if it had contained the words "age discrimination." The claims of involuntariness or lack of knowledge are more likely to be substantiated when the employee has little education, money, or legal experience, such as the plaintiffs in Mosley who worked as brake-yardmen. The fact that a lay person does not consult an attorney before signing a release does not require the court to find that the waiver was not knowing. Rogers v. General Elec. Co., 781 F.2d 452, 456 f.n. 7 (5th Cir. 1986) (holding that employee validly released Title VII claims against employer by signing waiver in exchange for $800).

Public policy favors voluntary settlement of employment discrimination claims brought under Title VII. Id. at 454. The settlement, signed by Thoman on February 14, 1985, operates as an accord and satisfaction and precludes any further litigation of contractual or statutory claims against the defendant.

Signed on February 24, 1987, at Houston, Texas.

/s/Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U.S.DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
NOV 29 1988
JESSE E. CLARK, CLERK
BY DEPUTY:
/s/ R. Thomas

CLAUDE LEWIS THOMAS	§	
Individually and on behalf of	§	
others similarly situated,	§	
	§	
Plaintiff,	§	
	§	
	§	
vs.	§	CIVIL ACTION NO. H-86-1955
	§	
CONCEPT, INC.	§	
	§	
Defendant.	§	

FINAL JUDGMENT

Claude Lewis Thoman takes nothing against Concept, Inc. .

Signed on November 29th, 1988, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-6210

U.S. COURT OF APPEALS
FILED
FEB 20 1990
GILBERT F. GANUCHEAU
CLERK

CLAUDE LEWIS THOMAN, Etc.,
Plaintiff-Appellant,

versus

CONCEPT, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 1/23/90, 5 Cir., 198_, __F.2d__)
(February 20, 1990)

Before GEE, JONES and SMITH, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a

majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith

United States Circuit Judge

Judge King did not participate in the consideration of the suggestion for rehearing en banc.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

Supreme Court, U.S.
FILED
JUN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1848

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CLAUDE LEWIS THOMAN,

Petitioner,

v.

CONCEPT, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

John M. Breckenridge, Jr.
Counsel of Record
2502 Rocky Point Road
Suite 225
Tampa, Florida 33607
(813) 281-0478

BEST AVAILABLE COPY

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Concept disagrees with the question presented in Thoman's Petition because it is clear that a civil rights claim can be knowingly and voluntarily waived. In cases where this issue is submitted to a jury after a full trial on the merits, as it was in Thoman's case, a single question is presented, *viz:*

Whether the jury charge as a whole, in connection with the contentions made by the parties and the evidence presented at trial, in general, correctly instructed the jury.

PARTIES TO THE PROCEEDING

Effective June 30, 1990, Concept's parent company, provided all necessary approvals are obtained and all legal filings are made, will be Bristol-Myers Squibb Company.

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STATEMENT OF THE CASE

Concept would add the following facts omitted from Thoman's Statement of the Case.

The Fifth Circuit, in Thoman II, found that Thoman was a man with a college education and experience with insurance and sales contracts (Petitioner's Brief, Appendix A, p.9-A). For several months prior to his resignation, Thoman had been aware that his job was in jeopardy because his supervisor, Robert Jackson, often criticized his performance. (Petitioner's Brief, Appendix A, p.3-A).

When presented with the release and asked to resign, Thoman read it and told Jackson he had no objection to waiving workers' compensation claims, but suspected that Concept was really terminating him because of his age (Petitioner's Brief, Appendix A, p.3-A) and wondered if that was legal. He signed the release anyway to get the $9,000. (Petitioner's Brief, Appendix A, p.4-A).

On appeal Thoman argued that the Court's instruction on waiver misled the jury. But the Court did not agree. It held that the Trial Judge's instruction that Thoman could act "Knowingly . . . even if he was mistaken about the effect of the release or failed to read the release" was harmless error because "Thoman admitted . . . he read the release, and his statements regarding workers' compensation . . . [indicated] . . . that he realized . . . the release waived at least one type of legal claim" so the erroneous charge "could not have misled the jury or resulted in any prejudice to Thoman." (Petitioner's Brief, Appendix A, p.7-A). It also ruled that the instruction on the standard for voluntariness was a correct statement of the law (Petitioner's Brief, Appendix A, p.7-A) and that Thoman was not entitled to an enumeration of the six factors referenced in Thoman I because "waivers are evaluated under a totality of circumstances test, with no one factor being dispositive." (Petitioner's Brief, Appendix A, p.8-A). Thus, the Appeals

Court held the charge, as a whole, adequately stated the law regarding waiver and the jury properly concluded Thoman was able to understand the release (Petitioner's Brief, Appendix A, p.9-A).

REASONS FOR NOT GRANTING THE WRIT

This is not a case of national importance that would require guidance by this Court. It doesn't present a novel question because an educated employee, like Thoman, can waive a discrimination claim, and the legal standard for such a waiver is whether or not the employee knowingly and voluntarily waived his claim. This question is determined by applying a totality of circumstances test.

There is no split of authority on applying the totality of circumstances test. All of the circuits apply it, they just refer to it by different names. Some circuits call it the totality of circumstances test, while others refer to it as a test of ordinary contract principles. But a careful review of each case shows that a civil rights waiver will not be inferred by a court based solely on the employee's signature on a release. All courts go beyond the signature to determine whether or not the employee actually knew what he was doing and did it voluntarily. There is no need for Supreme Court guidance because all circuits are in agreement on this point and the Trial Court instructed the jury to use this test.

I. THE STANDARD TO BE APPLIED IN DETERMINING THE VALIDITY OF A CIVIL RIGHTS WAIVER IS WHETHER OR NOT THE EMPLOYEE'S CONSENT TO THE WAIVER WAS KNOWING AND VOLUNTARY.

The Supreme Court has already stated the effectiveness of a civil rights waiver is determined by whether or not the employee's consent to the waiver was knowing and voluntary. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). In the more stringent constitutional setting, the question is whether it was "the product of an essentially free and unconstrained choice by its maker," *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) and was it a "voluntary . . . knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Therefore, if Thoman knowingly and voluntarily signed Concept's waiver, he forfeited his age-based discrimination claim.

II. THERE IS NO CONFLICT AMONGST THE CIRCUITS REGARDING THE TEST USED TO DETERMINE WHETHER A CIVIL RIGHTS WAIVER WAS KNOWING AND VOLUNTARY, THEY WEIGH THE TOTALITY OF CIRCUMSTANCES TO DETERMINE WHETHER THE EMPLOYEE KNOWINGLY AND VOLUNTARILY WAIVED THE CLAIM.

Thoman concedes that the Second and Third Circuits apply the totality of circumstances standard, but claims the Sixth and Eighth Circuit use a harsher ordinary contract principle standard and that the Fifth Circuit is somewhere in between. (Petitioner's

Brief, Appendix A, pp.6, 7, & 8). This is simply not so. All of the circuits use the totality of circumstance test, regardless of the name by which it is called.

Even though the Sixth and Eighth Circuits refer to an ordinary contract principle test, it's clear they consider all of the circumstances surrounding the waiver. In *Lancaster v. Buerkle Buick Honda*, 809 F.2d 539 (8th Cir.) *cert. denied*, 482 U.S. 928 (1987) the court addressed all of the facts attendant to the waiver including the length of time the employee was given to sign the agreement, his decision not to seek legal counsel, the fact he read the agreement and weighed its terms before signing it, the length of the document, the clear, simple, unambiguous language used, and the fact that the employee was in management and had signed numerous contracts in his lifetime. *Id.* at 541. Likewise, in *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) *cert. denied*, 479 U.S. 850 (1986) the court relied on the fact that the plaintiff was a well-paid, well-educated labor attorney with many years of experience who knowingly and deliberately executed the waiver. *See also Shaheen v. B.F. Goodrich*, 873 F.2d 105 (6th Cir. 1989) where the court considered the length of time the employee had the release, the fact she consulted an attorney, did not claim fraud, duress or mutual mistake, and presented no evidence to show her actions were less than voluntary. Likewise, *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 522, 533 (3rd Cir. 1988) where the court said to determine the validity of the release, "a review of the totality of circumstances, considerate of the particular individual who has executed the release, is also necessary." The Fifth Circuit is in accord, *see O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990) where the court said that the "totality of circumstances" approach is appropriate to determine whether or not a civil rights waiver is knowing and voluntary.

Thoman's reliance on the Appellate Court's decision in Thoman I is misplaced because the question on appeal was

whether there was a material question of fact that Thoman had knowingly and voluntarily waived his age claim. The Court held that there was and reversed the Trial Court's Summary Judgment. This question was given to the jury in Thoman II, under the proper test, and it concluded he did indeed know what he was doing.

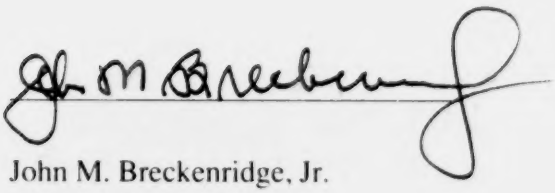
III. THE JURY CHARGE, IN GENERAL, CORRECTLY INSTRUCTED THE JURY.

The Appeals Court held that the jury was properly instructed to consider all the circumstances (the totality test) and decide if Thoman knowingly and voluntarily waived his discrimination claim (Petitioner's Brief, Appendix A, p. 9-A). It correctly refused to consider isolated statements, as urged by Thoman on appeal, *see Seaboard Airline Railway v. Padgett*, 236 U.S. 668, 672 (1915), where this Court held, "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case. . . ."

CONCLUSION

Since the knowing and voluntary standard is well-settled, all the circuits apply the totality of circumstances test, and the Trial Court correctly instructed the jury to use this test, there is no need for Supreme Court guidance on any issue in this case. Therefore, Concept respectfully requests that this Court deny Thoman's Petition for Writ of Certiorari.

Respectfully submitted,



John M. Breckenridge, Jr.
2502 Rocky Point Road
Suite 225, Tampa, Florida 33607
(813) 281-0478

ATTORNEY OF RECORD
FOR RESPONDENT